FILE COPY

No. 377

Office-Supreme Court, U.S.
FILED
AUG 13 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ROCKWELL MANUFACTURING COMPANY,
KEARNEY DIVISION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KENNETH C. MCGUINESS
1815 H Street, N.W.
Washington 6, D.C.

THEOPHIL C. KAMMHOLZ
105 South LaSalle Street
Chicago 3, Illinois

Attorneys for Petitioner

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
Federal Bar Building
1815 H Street, N. W.
Washington, D. C. 20006

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
A. The Facts	4
B. The Decision of the Court of Appeals	6
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	12
APPENDIX A	13
APPENDIX B	24

CITATIONS

Cases:

Dept. and Specialty Store Employees Union v. *Brown*, 284 F.2d 619, cert. denied, 366 U.S. 934	11
Morgan v. *United States*, 304 U.S. 1	11
National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U.S. 9	11
N.L.R.B. v. *Dallas City Packing Co.*, 230 F.2d 708	8, 10
N.L.R.B. v. *Lord Baltimore Press, Inc.*, 300 F.2d 671	8, 9, 10
N.L.R.B. v. *Poinsett Lumber and Mfg. Co.*, 221 F.2d 121	7, 8, 10

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et. seq.*):	
Section 8(a)(5)	3
Section 9(a)	3
Section 9(c)(1)(A)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

ROCKWELL MANUFACTURING COMPANY,
KEARNEY DIVISION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Rockwell Manufacturing Company, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit enforcing the order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 330 F.2d 795. It is reproduced in Appendix A to this petition. Orders of the Court of Appeals denying Rockwell's petitions for rehearing and rehearing *en banc* are reproduced

in Appendix B hereto. The Board's Decision and Order (J.A. 153-154, 157-159),[1] including the Intermediate Report of the Trial Examiner (J.A. 123-152), is reported at 142 NLRB 741.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1964. Timely petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals on May 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

The principal question presented is whether an employer who contests the validity of a National Labor Relations Board Certification of Representatives must be given an opportunity to be heard and to present its substantiating evidence at either the representation or the unfair labor practice stage of a Board proceeding.[2]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*, (herein called "the Act") are as follows:

---

[1] The record in the Court below was printed in a Joint Appendix, cited herein as "J.A."

[2] In addition, the following subsidiary question is presented:

> Whether the National Labor Relations Board properly concluded, in the face of threats and pressures exerted against employees, that the employees exercised a free choice in a representation election.

This question is so directly related to the principal question that, if Rockwell's position with respect to the latter should be accepted, it would be appropriate for the Court also to review the subsidiary question. In order to preserve Rockwell's position with respect to the latter issue, the matter is specifically adverted to herein.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an

officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT OF THE CASE

In this case a divided Court of Appeals sustained a decision of the National Labor Relations Board in which the Board found that Rockwell had refused to bargain with United Steelworkers of America, AFL-CIO, in violation of Section 8(a)(5) of the Act.

A. The Facts

On February 19, 1962, the Union filed a representation petition with the Board in which it sought certification as bargaining agent of Rockwell's employees. On March 6, 1962, Rockwell and the Union entered into a stipulation for Certification Upon Consent Election in which it was agreed that a representation election would be held on March 21, 1962 (J.A. 14-18, 125).

After the Stipulation was signed, and before the election was held, three[3] incidents occurred involving direct or indirect threats to employees of violence and economic loss for not supporting the Union. Two of these incidents involved threats made by a pro-union employee, Taylor, to Hayes, an anti-union employee. Taylor told Hayes, in the presence of two other employees, "I'm going to get you if the Union gets in." On another occasion, Taylor said to Hayes, "Whether the Union gets in or not, I'm going to

---

[3] In an offer of proof which was rejected by the Board (see, *infra*, p. 6), Rockwell sought to show that about two weeks before the election a fourth incident occurred. On this occasion, two union adherents told an employee he would be laid off after the union got in if he did not sign with the union (J.A. 120).

get you." When Hayes said he had nothing to worry about, Taylor replied, "Well, you better be because I'm going to get you" (J.A. 20-21). The third incident occurred at a union meeting.[4] Someone asked what a paint bomb was. A union official "outlined in some detail" the method of making such a bomb, but added, according to the Report of the Board's Regional Director, that the Union did not recommend or encourage the use of violence (J.A. 22-23).

In the election that was held on March 21, 1962, fifty employees voted for the Union, forty-nine employees voted against the Union, and one ballot was void (J.A. 19, 125).

Rockwell then filed with the Board's Regional Director timely objections to conduct affecting the results of the election. The Regional Director conducted an *ex parte* investigation of the objections, and concluded that the objections lacked merit. (J.A. 19-25, 125). Rockwell excepted to the Regional Director's Report, citing specifically, among other matters raising substantial questions, the failure of the Regional Director to make various factual findings (J.A. 25-30). The Board, however, sustained the Regional Director, denied Rockwell's request for a hearing on its objections, and certified the Union as the bargaining representative of Rockwell's employees (J.A. 25-31, 120-122).

---

[4] The Regional Director, without so finding explicitly, treated the paint bomb incident as having occurred in the interim between the signing of the Consent Election Stipulation and the election date (J.A. 22-24). In its rejected offer of proof, Rockwell placed the date of the event as "about February 22, 1962," or before the date when the Stipulation was signed (J.A. 119-120). As the Board would not consider conduct that occurred before the date of Stipulation as having an impact on the election, the question of when in fact the paint bomb incident occurred was material. Although the Court majority alluded to it, it does not appear that they attached any significance to the "February 22" date in Rockwell's offer of proof (App. A, p. 16).

In order to test the validity of the Board's certification, Rockwell refused to bargain with the Union (J.A. 116, 118-119). This prompted the Board to institute an unfair labor practice proceeding against Rockwell, in which it was alleged that Rockwell had violated Section 8(a)(5) of the Act. In its Decision, the Board affirmed its Trial Examiner, ruling specifically: (1) that Rockwell was precluded from adducing any evidence in support of its defense that the election underlying the Union's certification was invalid; (2) that the Trial Examiner had properly rejected Rockwell's offer of proof made in support of such defense; and (3) that Rockwell could not "relitigate" in the unfair labor practice proceeding matters which it had raised, and which the Board had passed upon, in the earlier representation proceeding (J.A. 153-154, 157-159, 36-37, 43, 114-115, 145). The Board, accordingly, found that Rockwell had violated the Act and ordered it to bargain with the Union (J.A. 154, 148-149).

B. The Decision of the Court of Appeals

Pursuant to Section 10(f) of the Act, Rockwell petitioned the United States Court of Appeals for the Seventh Circuit to review and set aside the Board's Decision and Order. The Court of Appeals, with Judge Swygert dissenting, denied Rockwell's petition and enforced the Board's order.

The Court majority upheld the Board's refusal to allow Rockwell to litigate, at the unfair labor practice stage of the Board proceeding, the issues Rockwell had raised with respect to the Board-conducted election. In so doing, the majority first noted, without indicating its agreement therewith, that the Board had decided in the representation stage that Rockwell's exceptions to the Regional Director's Report did not raise a material issue of fact necessitating a hearing (App. A, *infra*, p. 17). Then the majority ruled that the Board had not exceeded its

authority in rejecting Rockwell's offer of proof and in precluding litigation of representation issues at the unfair labor practice stage. As grounds for this ruling, the majority said that "the Board is not required to consider . . . evidence pertinent to the representation issues, which could have been advanced at that earlier [representation] stage" (App. A, *infra*, p. 17), and that "No reason was advanced for failure to adduce at the initial proceedings, any additional evidence listed in the offer of proof at the later stage of the case" (App. A, *infra*, p. 18).[5]

The substance of Rockwell's exceptions to the Regional Director's Report was not set forth or discussed by the Court majority; nor did it explain how Rockwell "could have advanced" additional evidence at the representation stage of the Board proceeding when Rockwell was denied the hearing it had requested at that stage.

In his dissenting opinion, Judge Swygert, citing *N.L.R.B.* v. *Poinsett Lumber and Mfg. Co.*, 221 F.2d 121, 123 (C.A. 4), and noting inconsistent action by the Board in other cases, stated that the failure of the Board to afford Rockwell a hearing constituted a denial of due process (App. A, *infra*, p. 22-23). Judge Swygert also viewed the Board's position as inconsistent with other Board and court cases where elections had been invalidated on the basis of pre-election conduct similar to that in which Rockwell's employees had been involved (App. A, *infra*, p. 21-22).

Rockwell petitioned the Court of Appeals for rehearing and rehearing *en banc*. The petitions were denied, with

[5] The court majority noted specifically that Rockwell, contrary to the Regional Director's finding that the paint bomb incident occurred in the context of a discussion of pre-election literature passed out by employees opposing the Union (J.A. 22), had been precluded from showing at the unfair labor stage of the Board proceeding that a Union official had described the making of a paint bomb in answer to the question: "How do you brand a scab?" (App. A, *infra*, p. 16). Except as set forth in the text above, the Court majority did not explain why the Board's rejection of this evidence was proper.

Judge Swygert voting to grant each petition (App. B, *infra*, p. 24-25).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below, both in its reasoning and in its result, is in conflict with two decisions of the Court of Appeals for the Fourth Circuit: *N.L.R.B.* v. *Poinsett Lumber and Mfg. Co.*, 221 F.2d 121 (1955), and *N.L.R.B.* v. *Lord Baltimore Press, Inc.*, 300 F.2d 671 (1962). It is also in conflict with the decision of the Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *Dallas City Packing Co.*, 230 F.2d 708 (1956).

In the *Poinsett* case, the union won an election by only a few votes. The company filed objections to the election and asked for a hearing on its objections. The objections concerned threats and pressure exerted against employees on behalf of the union. Without affording the Company a chance to be heard on its objections, the Board determined, on the basis of the Regional Director's Report, that the questions raised by the company's objections were not substantial, and, accordingly, certified the union. Charged with an unlawful refusal to bargain, at the unfair labor practice stage of the Board proceeding the Company offered evidence concerning the threats and coercive acts upon which it relied in attacking the validity of the election. The Trial Examiner, however, excluded the proffered evidence. The Board then affirmed the Examiner and ordered the Company to bargain with the union. The Fourth Circuit refused to enforce the Board's order on the ground that the company was entitled to present its evidence at the unfair labor practice stage of the Board proceeding. The Court said (221 F.2d at 123):

> If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of

> special circumstances showing that it was in the interest of justice that this be done; but the evidence has not been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unquestionably been raised by its exceptions. We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's order.

The *Poinsett* case was followed and cited with approval by the Fourth Circuit in the *Lord Baltimore* case. Indeed, the facts of the two cases are similar. In *Lord Baltimore*, the Union won a consent election, and Baltimore filed objections to the election on the ground that its supervisors had coerced its employees to support the union. The Regional Director conducted an *ex parte* investigation and overruled the objections. The Board denied Baltimore's exceptions without a hearing and certified the union. Baltimore, like the company in the *Poinsett* case, was then charged with an unlawful refusal to bargain. Before the Trial Examiner, Baltimore proffered oral and documentary evidence to delineate the conduct of one of its supervisors with respect to employees. The Examiner refused to hear the evidence, and, as in *Poinsett*, the Board affirmed the Trial Examiner and issued a bargaining order. Again, the Court held that the Board had erred in rejecting the evidence Baltimore offered before the Examiner. The Court said (300 F.2d at 673):

> With the Respondent Baltimore, we think it should have been heard on its exceptions in the election proceeding. Indwelling, of course, was a request for a hearing upon them. The Board's Rules and Regulations, Sect. 102.69, allowed such a hearing. But we need not now enlarge on the point because, in the absence of a hearing at that stage, the employer should

certainly have been accorded a hearing thereon in the complaint proceedings. . . .

The *Dallas City* case is similar. There, the union won an election by a narrow margin; the employer filed objections to the conduct of the election; the Board's Regional Director, on the basis of an *ex parte* investigation, found that the objections lacked merit; the employer excepted, and requested a hearing on its objections; the Board denied the request, sustained the Regional Director, and certified the union. At the unfair labor practice stage, the Examiner refused to consider the asserted invalidity of the election, deeming himself bound by the Board's certification; the Board affirmed the Examiner and entered a bargaining order. The Sixth Circuit denied enforcement of the Board's order because of the failure to grant the employer a formal hearing on its objections, the Court saying: "We think the opportunity to make proof should have been given" (230 F.2d at 711).

In sum, the *Poinsett*, *Lord Baltimore*, and *Dallas City* cases clearly set forth the principle that where substantial questions are raised concerning the validity of an election, the Board, either at the representation stage or at the unfair labor practice stage of the Board proceeding, must grant the party raising such questions a formal hearing at which it may cross-examine adverse witnesses and present its proof orally by witnesses under oath. In the instant case, however, in an action inconsistent with this principle, the Court majority affirmed the Board's denial of such a hearing to Rockwell even though Rockwell had raised substantial questions concerning the election in which the Union had won by but a single vote.

2. The question of whether Rockwell was entitled to a formal hearing at some stage of the Board proceeding is of major importance because it involves a matter of constitutional due process. Judge Swygert, dissenting in the

Court below, so recognized the issue (App. A, *infra*, p. 22).

The Court of Appeals for the Ninth Circuit, in *Dept. and Specialty Store Employees' Union* v. *Brown*, 284 F.2d 619 (1961), cert. denied, 366 U.S. 934, has likewise viewed the question of the lack of a hearing in Board proceedings as one involving due process. It said:

> It is not a requirement of due process that there should be a judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are involved, that there is at some stage an opportunity for a hearing and a judicial determination. . . . Generally speaking, due process does not require a hearing at any particular time, but only before substantial rights are affected (284 F.2d at 628).

And this Court itself has also spoken on the necessity for granting a fair hearing to a respondent in a National Labor Relations Board unfair labor practice proceeding. In *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 28 (1943), the Court said:

> The Act accords a great deal of finality to the Board's findings of fact. . . . The statute demands respect for the judgment of the Board as to what the evidence proves. But the [reviewing] court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

See also, in this respect, *Morgan* v. *United States*, 304 U.S. 1, 14-15 (1937).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH C. MCGUINESS
1815 H Street, N.W.
Washington 6, D.C.

THEOPHIL C. KAMMHOLZ
105 South LaSalle Street
Chicago 3, Illinois

Attorneys for Petitioner

Of Counsel:

VEDDER, PRICE, KAUFMAN & KAMMHOLZ
Federal Bar Building
1815 H Street, N. W.
Washington, D. C. 20006

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1963—JANUARY SESSION, 1964

No. 14257

ROCKWELL MANUFACTURING COMPANY,
KEARNEY DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside and on Request for Enforcement of an Order of the National Labor Relations Board.

March 31, 1964

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges.*

KNOCH, *Circuit Judge.* This matter is before us on the petition of Rockwell Manufacturing Company, Kearney Division, hereinafter called "Rockwell," to review [1] and set

[1] National Labor Relations Act, as amended, Title 29 U.S.C. § 151 et seq., § 160(f).

aside the decision and order [2] of the National Labor Relations Board.

The Board found that Rockwell violated § 8(a)(5) of the National Labor Relations Act, by refusing to recognize and to bargain with United Steelworkers of America, AFL-CIO, hereinafter called the "Union," as the authorized representative of Rockwell's employees, and by granting unilateral benefits to Rockwell employees; and that Rockwell further violated § 8(a)(1) by coercive interrogation of employees concerning their union activities and sympathies, and by threatening reprisals or promising benefits to induce abstention from such activity.

In its answer, the Board has requested enforcement of its order. No jurisdictional issue is presented.

On February 19, 1962, the Union filed a representation petition with the Board seeking certification as bargaining agent for Rockwell's employees.

On March 6, 1962, Rockwell and the Union entered into a Stipulation for Certification upon Consent Election to be held March 21, 1962, at Rockwell's plant in Kearney, Nebraska.

We need not detail the facts on which the Board bases its finding of § 8(a)(1) violation through interrogation, prior to the election, as Rockwell states it will not contest these findings, although in Rockwell's opinion, the Board did not correctly resolve the issues of credibility involved in assessing and weighing the testimony.

The election was held, and the Union won by 50 to 49, with one ballot held to be void. Rockwell filed timely objections to the election, alleging that a general atmosphere of anxiety had been created among the employees prior to the election, by Union suggestions to use force in enlisting

---

[2] Reported 142 NLRB No. 86, 63-1 CCH NLRB 19,285, issued May 23, 1963, amended June 25, 1963.

members, threats of physical harm to non-Union supporters, and Union instruction in making paint bombs for possible use against the latter.

These objections were investigated by the Board's Regional Director who recommended they be overruled. Rockwell filed exceptions to this report. The Board sustained the Regional Director's recommendations and certified the Union.

Rockwell posted a notice to its employees indicating that it would not bargain with the Union because it felt that it had been denied due process and proper hearing on the matter of Union intimidation; that Rockwell would force the matter into the federal courts by refusing to accept the Board's decision in an effort to protect the interests of its employees.

Accordingly Rockwell refused to meet and bargain with the Union. In November, 1962, certain wage increases, an additional paid holiday, and some medical benefits were granted unilaterally without notice to or consultation with the Union. Rockwell explains that it was precluded from consulting with the Union as it hoped by non-recognition to secure a hearing on its charges that the Union had been guilty of coercion of Rockwell's employees in the pre-election period.

The Board asserts that in its objections Rockwell raised no issue which would justify setting aside the election. Whether to set aside an election because of incidents during the campaign period is a matter for the sound discretion of the Board. As has been frequently remarked:

> * * * Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.

NLRB v. *Waterman Steamship Corp.*, 309 U. S. 206, 226 (1940); *NLRB* v. *Tower Co.*, 329 U. S. 324, 330 (1946);

Olson Rug Co. v. *NLRB*, 7 Cir., 1958, 260 F. 2d 255, 256-7.

Several of the incidents on which Rockwell's objections rested occurred during the critical period, i.e. after the consent to election. After certification of the Union, the Board changed its procedures, effective prospectively only, to consider (as grounds for setting aside a consent election) such electioneering conduct as occurs during the period beginning with the petition for election.

Consideration was given to threats made on two occasions by Duane Taylor, a Rockwell employee who favored the Union, but who held no position in it, to Mr. Hayes, another employee who was opposed to the Union and who stated that he voted against it. He also told the Board's investigator that he did not take the first threats seriously, that he did not believe them, and laughed at them. Two other employees who were present also said "It was all in fun." Mr. Hayes reported only the second threat to his foreman, but at that time, he stated, he was not afraid of anything Mr. Taylor could do to him.

Another incident, involving paint bombs, was originally understood to have occurred after the consent to election and was investigated and considered. In its subsequent offer of proof in connection with the charges of refusal to bargain with the certified Union, Rockwell placed the date of this incident as about February 22, 1962, or before the consent to election, on March 6, 1962, which marked the cut-off date then in effect.

The Board investigator reported that all those questioned said that the matter came up at a Union meeting in connection with distribution of anti-Union literature; that someone asked what a paint bomb was. In the subsequent offer of proof, Rockwell offered to call witnesses who would testify that instructions on making paint bombs were given in response to a question: "How do you brand a scab?"

Although the Union official present asserted that the Union was seeking to make friends and recommended no violence, he did explain just how to make and use a paint bomb.

The Regional Director reported no evidence that this disclosure went beyond the meeting or received any publicity.

The Board has always considered it a question of degree whether the conduct revealed by the record is so glaring as to impair the employees' freedom of choice, necessitating a new election. *General Shoe Corp.* (1948) 77 NLRB 124, 126.

Each incident must be considered in the light of the precise circumstances of a particular case, having reference to the timing, proportion of employees affected, and the character of the threat.

As the exceptions filed to the Regional Director's report alleged no additional evidence which the Regional Director had overlooked respecting these incidents which were considered by him, the Board found no material issue of fact necessitating a hearing, and Rockwell's request for a hearing was denied, pursuant to the Board's rules and regulations, under which the Board may direct a hearing,

> * * * If it appears to the Board that such exceptions raise substantial and material factual issues, * * *

The Board requires specific evidence of conduct which prima facie would warrant setting aside the election. *NLRB* v. *O.K. Van Storage, Inc.*, 5 Cir., 1961, 297 F. 2d 74, 76.

At the unfair labor practice stage of the litigation, however, the Board is not required to consider new allegations and evidence pertinent to the representation issues, which could have been advanced at that earlier stage. *Allis-Chalmers Mfg. Co.* v. *NLRB*, 7 Cir., 1947, 162 F. 2d 435,

440-441. The Board accordingly rejected the offer of proof made at that stage of the proceedings. We cannot agree with Rockwell that the Board exceeded its authority, nor can we concede that such exceptional circumstances were shown here as to require a departure from the Board's established and reasonable practice. Rockwell's offer of proof at the unfair labor practice stage concerned the same two objections which the Board had treated. No reason was advanced for failure to adduce at the initial proceedings, any additional evidence listed in the offer of proof at the later stage of the case.

The Union was certified in August, 1962. On September 5, 1962, in *Goodyear Tire & Rubber Co.*, 138 NLRB 453, 455, the Board announced that it would consider conduct occurring any time after the representation petition was filed, but with respect only to petitions filed after September 17, 1962. The new rule would be inapplicable, not only to elections such as Rockwell's, which had been decided, but even to any of the numerous pending cases wherein the petition was filed prior to September 17, 1962.

Rockwell considers this procedure arbitrary and highly prejudicial to Rockwell, because it cuts off consideration of incidents prior to the consent date, outlined in Rockwell's offer of proof at the unfair labor practice stage. These alleged incidents included at least three open threats of violence by pro-Union against anti-Union employees, and a statement, by the same Union official who had described paint bombs, to the effect that "there was more than one way to get union authorization cards signed, such as using pressure or getting rough."

When in *Goodyear*, supra, on September 5, 1962, the Board set the cut-off date as the date of the petition, in consent elections, the rule was made applicable for a future time consistent with the policy in the case of *Ideal Electric & Mfg. Co.*, December 14, 1961, 134 NLRB 1275, 1278, where it was said:

> Finally, we have concluded that in order to avoid undesirable confusion as to the impact of this new policy on cases currently pending before the Board, we shall not apply the new policy enunciated herein to the instant case or to others now pending * * *

Similarly, the Board here contends that any other course of action would raise questions necessitating reinvestigation of a number of pending cases. The Board refers to its 27th Annual Report as showing that 5,432 elections of this type were conducted during the fiscal year ending June 30, 1962, and that 2,060 representation cases of all types were pending on June 30, 1962.

While Rockwell's individual situation excites our sympathy, we must admit that providing for prospective application of the new rule was neither arbitrary nor capricious. The Board may fix the effective date of its rule changes and apply its standards prospectively. *NLRB* v. *Red Rock Co.*, 5 Cir., 1951, 187 F. 2d 76, 78, cert. den. 341 U. S. 950; *Optical Workers Union* v. *NLRB*, 5 Cir., 1955, 227 F. 2d 687, 691, and 1956, 229 F. 2d 170, 171, cert. den. 351 U. S. 963.

Rockwell's petition for review is denied. The Board's order will be enforced.

ENFORCEMENT ORDERED.

No. 14257.

SWYGERT, *Circuit Judge*, dissenting.

Three incidents occurred within the period between the consent election agreement and the election which, in my opinion, required the Board to invalidate the election.

Two of these incidents involved threats made by a pro-union employee, Taylor, to Hayes, an anti-union employee. Taylor told Hayes in the presence of two other employees,

"I am going to get you if the union gets in." On another occasion he said to Hayes, "Whether the union gets in or not I am going to get you." When Hayes said he had nothing to worry about, Taylor replied, "Well you better because I am going to get you." By far the most serious incident occurred at a union meeting held before the election. Someone at the meeting asked what a paint bomb was. A union official explained how one was made but added, according to the report of the regional director, that the union was there to make friends and did not recommend violence.[1]

---

[1] The regional director's investigation of the company's objections to the election was *ex parte*. In its attempt to gain a hearing on its objections in the instant unfair labor practice proceeding, the company made the following offer of proof which was rejected by the trial examiner:

> Respondent would, if permitted, call witnesses who would testify that at the second or third meeting of the union, about February 22, 1952, Steelworker representative Graham, in answer to the question "How do you brand a scab?", advised Rockwell employees on how to make paint bombs by drilling a ¼" hole in the base of a light bulb, filling the bulb with paint, and covering the hole with a wad of gum; that at the same meeting Graham advised against using paint bombs or violence but thereafter gave instructions on how to throw bombs on the roofs of houses rather than the sides because it was more difficult to paint over shingles, and greater damage was thereby inflicted; that on or about February 15, 1962, in a Texaco Service Station at 25th Street and Avenue A, Kearney, Jim Fox, Roger Potter, and Robert Whaley asked one employee to sign a union authorization card; that when said employee replied he didn't think he was interested, Fox said, "You better sign it or you are going to die."; that, at a meeting of employees who were against the union, a union adherent declared violence would be used to keep non-union members in line; that late one morning during the week of March 5, 1962, in the plant, Duane Taylor said to an employee who actively worked against the union and was instrumental in obtaining information about violence in which the union had engaged at another plant of the company in Atchison, Kansas, "I'm going to get you if the union gets in."; that Taylor said to the same employee on another occasion, "Whether the union gets in or not, I'm going to get you."; that prior to the election, said

The general counsel for the Board says these incidents were "manifestly insufficient" to justify setting aside the election and that the Board in exercising its broad discretion in the representation proceeding acted "within reasonable bounds."

Contrary to the Board's position, similar pre-election conduct has been found sufficient for setting aside elections. In *N.L.R.B.* v. *Tampa Crown Distributors*, 272 F. 2d 470 (5th Cir. 1959), the court denied enforcement of the Board's order certifying the union because two employees had received anonymous telephone calls before the election threatening their families. The court held that this constituted an atmosphere of fear rendering a free election impossible. See, *e.g.*, *Poinsett Lumber & Mfg. Co.*, 116 N.L.R.B. 1732 (1956); *Stern Bros.*, 87 N.L.R.B. 16 (1949); *G. H. Hess, Inc.*, 82 N.L.R.B. 463 (1949).

Only recently in *N.L.R.B.* v. *Realist, Inc.*, —— F. 2d ——, decided February 25, 1964, this court enforced a Board order which had upheld the regional director's action in setting aside an election—one that the union had lost. There, the employer had made statements about unionized plants moving out of the state and that without a union the employees would be afforded equal if not better benefits. We held that the employer's speech constituted an interference with the employees' freedom of choice and formed a sufficient basis for ordering a new election.

Here the shoe is on the other foot. Pro-union statements about how paint bombs were made and threats of harm to people if the union lost created an atmosphere out

---

employee told other employees of Taylor's threats; that at a union meeting about March 2, 1962, Graham said there was more than one way to get union authorization cards signed, such as using pressure or getting rough; and that about two weeks before the election two union adherents told an employee returning to his work station after dinner, "If you don't sign up with the union and the union gets in, you will be laid off."

of harmony with the laboratory conditions which the Board must afford for representation elections.

Comparing the facts in *Realist* with those in the instant case, I am compelled to conclude that the Board has applied a double standard in these cases. The general counsel refers to the wide degree of discretion the Board has in establishing safeguards to insure fair elections. He also says that the Board itself is fully cognizant of the responsibilities imposed upon it to conduct elections fairly. Neither statement is subject to dispute except for the fact that the Board's diverse treatment of these cases speaks for itself.

Moreover, the Board should have afforded Rockwell a hearing on its objections in the instant proceeding. The failure to do so was, in my opinion, a denial of due process. In a similar situation, the Fourth Circuit in *N.L.R.B.* v. *Poinsett Lumber & Mfg. Co.*, 221 F. 2d 121, 123 (4th Cir. 1955), said:

> If a hearing had been held and the evidence had been taken and passed upon by the Board in the representation proceeding, the Board would not be required to go into the matter again in the absence of special circumstances showing that it was in the interest of justice that this be done; but the evidence has not been taken nor a hearing accorded the company at any time even though substantial questions affecting the validity of the election had unquestionably been raised by its exceptions. We think that it is entitled to a hearing at some stage of the proceedings so that it may produce the evidence upon which it relies for consideration by the Board and for consideration by this court in proceedings to enforce or set aside the Board's order.

The Board itself has adhered to this view in *Celanese Corp. of America*, 125 N.L.R.B. 352 (1959), and *Underwood Mach. Co.*, 80 N.L.R.B. 1264 (1948).

This court's decision in *Olsen Bag Co. v. N.L.R.B.*, 260 F. 2d 255 (7th Cir. 1958), is inapposite; the facts are clearly distinguishable. In *Olsen* all the evidence (campaign literature) was before the regional director in the representation proceeding. In the instant case, the trial examiner refused to consider the company's evidence which it claimed amplified the facts presented to the regional director.

I would reverse that part of the Board's order that requires the company to bargain with the union.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois, 60610

Tuesday, May 19, 1964

Before

HON. F. RYAN DUFFY, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

ROCKWELL MANUFACTURING COMPANY,
Kearney Division,
Petitioner,

No. 14257

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

IT IS ORDERED that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

(Swygert, C.J. voted to grant petition for rehearing).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois, 60610

Tuesday, May 19, 1964

Before

HON. JOHN S. HASTINGS, *Chief Judge*
HON. F. RYAN DUFFY, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*

ROCKWELL MANUFACTURING COMPANY,
Kearney Division,
Petitioner,

No. 14257

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

IT IS ORDERED by the Court sitting en banc that the petition for a rehearing en banc of this cause is, and the same is hereby, DENIED.

(Swygert, C.J. voted to grant petition for rehearing *en banc*).